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16
17 **UNITED STATES DISTRICT COURT FOR THE**
18 **NORTHERN DISTRICT OF CALIFORNIA**

19 ALICIA HERNANDEZ et al., individually
20 and on behalf of all others similarly situated,

21 Plaintiffs,

22 v.

23 WELLS FARGO BANK, N.A.,

24 Defendant.

Case No. 3:18-cv-07354-WHA

**PLAINTIFFS' OPPOSITION TO
WELLS FARGO'S ADMINISTRATIVE
MOTION FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF REGARDING
DEMONSTRATIVE EVIDENCE
SUBMITTED BY PLAINTIFFS AT
CLASS CERTIFICATION HEARING**

Wells Fargo's request to file redundant briefing on Plaintiffs' UCL restitution claim should be denied. Wells Fargo simply repeats the same arguments it made in its opposition brief: that Plaintiffs are wrong that in awarding UCL restitution, this Court, under *Pulaski & Middleman, LLC v. Google, Inc.*, has flexibility in the date at which restitution is calculated. 802 F.3d 979, 988-89 (9th Cir. 2015); see Dkt. 188 at 17:18-18-20; Dkt. 211-1. In its opposition, Wells Fargo already argued that the two types of restitution Plaintiffs seek – the value of the property Wells Fargo wrongfully took and the excess mortgage payments they paid due to Wells Fargo's failure to offer loan modifications – are not recoverable under the UCL. Plaintiffs have now disclosed the amount of restitution class members seek based on their expert's work, but that does not change the bank's arguments. The Court already has what it needs to assess the parties' positions on this issue.

If the Court, however, considers Wells Fargo's brief, it should nevertheless certify the UCL claim because common liability issues predominate and the bank presents an overly narrow reading of restitution. The California Supreme Court has made clear that restitution under the UCL "is not limited only to the return of money or property," and that a court may exercise broad powers in awarding restitution in order to restore "the *status quo ante* as nearly as may be achieved." *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal.App.4th 663, 698 (2006); see also *Fletcher v. Sec. Pac. Nat'l. Bank*, 23 Cal.3d 442, 452 (1979) ("A court of equity may exercise its full range of powers 'in order to accomplish complete justice between the parties, restoring if necessary the *status quo ante* as nearly as may be achieved.'" (quoting *People v. Superior Court (Jayhill)*, 9 Cal.3d 283, 286, 107 (1973))).

The primary purpose of UCL restitution is restoring the plaintiff to the position she would have been in absent the wrongdoing. *Colgan*, 135 Cal.App.4th at 697-698 (citing *Fletcher*, 23 Cal.3d at 450); *Pulaski & Middleman*, 802 F.3d at 988-89. Where a defendant has wrongfully taken a plaintiff's property, the measure of restitution "'is the value of the property at the time of its improper acquisition ... or a higher value if this is required to avoid injustice' where the property has changed in value." *Id.* (citations omitted) (emphasis added). Wells Fargo's brief did not address this portion of *Pulaski*, which cites the Restatement of Restitution, and states that if property the defendant took has fluctuated in value, the measure of restitution can be adjusted (and made higher) to avoid injustice. Restatement (First) of Restitution § 151.

Courts have held that the forms of restitution Plaintiffs seek are recoverable under the UCL. In *Majd v. Bank of America, N.A.*, the plaintiff sued under the UCL based on the defendant-bank's "dual tracking" (*i.e.* initiating a loan modification review while simultaneously proceeding with foreclosure) and ultimate wrongful foreclosure of his home. 243 Cal.App.4th 1293, 1302 (2015). The court considered whether the plaintiff had "lost money or property as a result of the unfair competition," and held, "[t]here is no question that plaintiff alleged economic injury in the form of the loss of his home." *Id.* at 1034 (citing *Lueras v. BAC Home Loans Servicing, LP*, 221 Cal.App.4th 49, 82 (2013)). The *Lueras* court similarly held that "[s]ale of a home through a foreclosure sale is certainly a deprivation of property to which a plaintiff has a cognizable claim" for UCL purposes. 221 Cal.App.4th at 82; *see also Hahn v. Select Portfolio Servicing*, 2018 WL 6046463, at *4 (N.D. Cal. Nov. 19, 2018) (plaintiffs established claim for UCL standing by alleging they lost equity in their property and paid "improper foreclosure fees").

Estrada v. Caliber Home Loans, Inc. establishes that a plaintiff can seek "lost money or property" under the UCL in the form of mortgage payments. 172 F. Supp. 3d 1108 (C.D. Cal. 2016). There, the plaintiff was forced to make higher monthly payments on her loan because the defendant-loan servicer failed to honor a modification she had received at one point. *Id.* at 1116-17. The court held that she adequately alleged UCL injury based on those higher mortgage payments. *Id.* at 1117.

Here, Plaintiffs allege that Wells Fargo violated the UCL by failing to adequately test and monitor its mortgage modification practices, and by failing to adhere to HAMP. Dkt. 87 at 8-9. Certain Plaintiffs and class members will seek to prove in the remedies phase that the "property" they lost as a result of Wells Fargo's unfair business practices was their home. Wells Fargo took these homes at the time of foreclosure and later sold them; it is therefore impossible to return the actual property back to class members. So, to restore the *status quo ante* "as nearly as can be achieved," Plaintiffs seek the value of the homes as restitution. And because those homes have increased in value since the time of the foreclosure, the Court may award that higher value to avoid injustice. At the remedies phase, these Plaintiffs and class members will argue that it would be unjust to measure the value of the property taken at a time when values were low, given that one of the purposes of the modification was to allow borrowers to stay in their homes and enjoy the benefits of long-term home ownership, including

1 appreciation in value. *See Jordan v. Paul Financial, LLC*, 285 F.R.D. 435, 455 (N.D. Cal. 2012)
 2 (Illston, J.) (finding plaintiffs had shown injury in fact under the UCL with lost equity in their home as
 3 well as loan payments they paid due to the wrongful conduct).

4 Wells Fargo tries to brush aside *Majd* and *Estrada* as cases that generally concerned UCL
 5 standing to sue for lost money or property. Dkt. 211-1 at 6. But at class certification, Wells Fargo
 6 argued that certification of Plaintiffs' UCL claim should be denied because "Plaintiffs Do Not Have
 7 UCL Standing." Dkt. 188 at 17 (heading). *Majd* and *Estrada* refute Wells Fargo's argument that
 8 "Plaintiffs seek remedies that are not available under the UCL," and thus "do not have
 9 standing to pursue that claim." Dkt. 188 at 18. Indeed, those decisions *confirm* that Plaintiffs here have
 10 standing to pursue remedies that *are* available under the UCL.

11 Wells Fargo also leans heavily on *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134
 12 (2003), but that case is distinguishable. In *Korea Supply*, the plaintiff alleged that the defendant
 13 unlawfully induced a foreign government to award a military purchase contract to the defendant rather
 14 than the plaintiff's client. *Id* at 1140. The plaintiff stood to receive a \$30 million commission had its
 15 client been awarded the contract. *Id*. The Supreme Court held because the plaintiff did not have "an
 16 ownership interest in the money it seeks to recover from defendants" and was "not seeking the return of
 17 money or property that was once in its possession," *id.* at 1149-50, it was seeking non-restitutionary
 18 disgorgement, which the UCL does not permit. Here, in contrast, Wells Fargo took Plaintiffs'
 19 properties that *were* once in their possession; thus, Plaintiffs are not attempting to recover the non-
 20 restitutionary disgorgement *Korea Supply* prohibits.

21 Plaintiff's expert Dan Salah estimated the current value of the homes today, and to avoid a
 22 windfall to Plaintiffs, subtracted out the full amount that Plaintiffs and class members owed on those
 23 properties. Awarding restitution in the form of lost home value minus debt owed on the home will
 24 restore the *status quo ante* as nearly as possible, since Wells Fargo no longer owns those homes and is
 25 not able to return them to class members.

26 Even class members who did not lose their homes to foreclosure lost money as a result of Wells
 27 Fargo's UCL violation because the modifications that Wells Fargo should have offered to class
 28 members had loan terms that were more favorable than their original loans – such as a lower interest

1 rate, principal reduction or forbearance amount. For these class members, Salah has estimated, in
 2 present value terms, the “difference between the mortgages they continued to pay on and the modified
 3 mortgages they were qualified for but didn’t receive.” Dkt. 211-4, Salah Depo. at 28:3-11. This
 4 difference is the present value of the extra amount class members have paid or owe to Wells Fargo.

5 Wells Fargo may disagree with Salah’s provisional restitution estimates, but it will have a full
 6 opportunity to challenge these figures at the remedies phase following class-wide adjudication of
 7 liability. Such disagreement, however, is not grounds to deny class certification.

8 In sum, Wells Fargo’s motion to file a supplemental brief on Plaintiffs’ restitution theory should
 9 be denied as unnecessary because it merely rehashes arguments that it has already pressed. If, however,
 10 the Court accepts Wells Fargo’s submission, it should reject Wells Fargo’s stingy understanding of
 11 restitution as contrary to California law.

12 Dated: January 27, 2020

Respectfully submitted,

13 /s/ Michael Schrag

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